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No. 756

Supreme Court, U.S.
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JAMES H. McKENNEY,
Clerk.

Brief of Beckett for D. E. (amo.)

In the Supreme Court of the United States.

NO. 756

Filed April 5, 1899.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY,

Plaintiff in Error

versus

WIRT ADAMS, STATE REVENUE AGENT,

Defendant in Error.

Error to the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT.

R. C. BECKETT,

Attorney for Defendant in Error.

Baltzhaver & Hauser, Printers, 402 Poydras St.

5596

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

NOTICE ON MOTION TO DISMISS OR AFFIRM.

To MR. EDWARD MAYES, *Counsel for Plaintiffs in Error:*

Please take notice that on Monday, the 24th day of April, A. D. 1899, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the attached are copies, will be submitted to the Supreme Court of the United States, for the decision of said Court thereon. Annexed hereto also is a copy of the brief of argument to be submitted with the said motions in support thereof. And accompanying is the special record and all the opinions of the Supreme Court of Mississippi.

R. C. BECKETT,

Counsel for Defendants in Error for the Purposes of These Motions.

UNITED STATES OF AMERICA,

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Before me, L. B. Moseley, Clerk of the said Circuit Court of the United States for the Southern District of Mississippi, this day personally appeared, Wirt Adams, the defendant in error in the above

styled cause, and being by me duly sworn deposes and on oath says that he this day served the foregoing notice, with the annexed motions and brief of argument, on Mr. Edward Mayes, the counsel of record for the plaintiffs in error, by delivering to him in hand and in person a true copy of said notice, motions and brief of argument,

Sworn to and subscribed before me this the ——— day of April, A. D. 1899, as witness my hand and the seal of said Court.

In the Supreme Court of the United States.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Wirt Adams, State Revenue Agent, by his counsel, appearing in that behalf, and moves the Court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:—

1. No Federal question was raised or attempted to be raised in the State Courts until after the decision and judgment of the State Supreme Court of Mississippi on the first appeal to that Court, and then for the first time in the suggestion of errors, and the action of the Circuit Court below after the mandate was sent down to that Court in striking from the files the additional pleas attempted to be filed at its July, 1898, term after the Supreme Court had settled the principles of the cause, and long after the pleading terms of all the cases had expired, and out of time, raises no Federal question.
2. The action of the defendants, plaintiffs in error here, in withdrawing all their pleas on file and permitting judgment *nil dicit* to go against them, when and because the Circuit Court struck from the files their said additional pleas attempting to set up a Federal question, was an admission that they had no defense on the facts of the case, and deprived them of any right to insist on a Federal question.

3. The petition for removal of the case from the State Circuit Court to the United States Circuit Court does not present any Federal question, and was not made until after the case had been tried in the State Supreme Court, reversed and remanded, and long after the appearance terms of each and all of the cases, and overruling the same, raises no Federal question.

4. No Federal question is mentioned or relied on by the plaintiff, anywhere, and under repeated decisions of this Court that it cannot be raised by the defendants, their attempt to thus raise such a question and use it as a basis to secure a removal to the United States Circuit Court presents no Federal question.

5. The charters of the two railroad companies which by consolidation formed the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error, to-wit; that of the original Yazoo & Mississippi Valley Railroad Company was granted by the Legislature of the State of Mississippi on February 17th, 1882 (Acts 1882, p. 838), and that of the Louisville, New Orleans & Texas Railway Company by the Act of March 15th, 1884 (Acts of 1884, p. 936), amendatory of the Act of March 3d, 1882 (Acts 1882, p. 1011), after the Mississippi Constitution of December 1st, 1869, had been adopted, and had been construed in the year 1878 by the Mississippi Supreme Court in the case of Mississippi Mills vs. Cook, 56 Miss. Rep., p. 40, to prohibit the Legislature from granting irrepealable exemptions from taxation, and the decision of the said Supreme Court of Mississippi on the first appeal that section five of the charter of said Louisville, New Orleans & Texas Railway Company, under which the exemption is claimed in this case, is in conflict with Sections 13 and 20, Article 12, of said Mississippi Constitution and void, because it is in terms irrepealable raises no Federal question.

6. The decision of said Supreme Court on said first appeal, under the facts above stated, that said alleged exemption, if it existed was lost by and in the consolidation of October 24, 1892, between the said original Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company raises no Federal question.

7. The decision of said Supreme Court on said first appeal, under said facts, that Section 180 of the Mississippi Constitution of November 1st, 1890, prevented said alleged exemption, if it existed, from passing into said consolidation of October 24th, 1892, raises no Federal question.

8. The decision of said Supreme Court under the facts above

stated that the exemption claimed in this case was repealed by the laws of Mississippi, the same being a repealable exemption raises no Federal question.

9. The action of the Circuit Court in refusing a continuance on account of the absence of alleged leading counsel, and in overruling the objections of the defendants to a trial at the July, 1898, term of the Court are matters of State practice and raise no Federal question.

10. The said Wirt Adams, State Revenue Agent, sues for the use of the State of Mississippi, and of the counties therein, of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore, and of the towns of Tunica, Lula, Ciahoma, Clarksdale, Jonestown, Frier's Point, Shelby, Cleveland, Shaws, Rosedale, Gunnison, Leland, Hollandale, Rolling Fork, Vicksburg, Port Gibson, Russum, Harriston, Hamburg, Roxie, Knoxville, Gloster and Centerville, and neither said State, nor any of said counties, or towns are named or made parties to the citation of writ of error.

11. The sheriffs and tax collectors of said fifteen counties, to-wit: W. H. Rollins, T. O. King, R. N. Harris, G. P. Melchior, J. L. Griffin, H. J. Wright, A. N. Smith, J. M. A. Brennan, N. S. Walker, L. W. Caradine, R. S. Butler, D. M. Butler, C. H. Neyland, C. H. Fonda, W. C. George, and ex-Tax Collector J. L. Sullivan were all made parties to the first declaration under Annotated Code of 1892, section 4200, the same sheriffs and tax collectors to the second declaration, the same except Williams Griffin and Charles Kennard, instead of J. L. Griffin and N. S. Walker to the third declaration, and W. S. Wissinger, F. L. Hope, F. B. Fitzgerald, R. M. Edwards, J. B. Hebron, C. H. Walton, R. W. Smith, Dan N. Hebron, R. C. McCay, C. C. Coffey, J. P. Jones, J. B. Turnispeed, J. M. Sessions, J. H. Sullivan and J. B. Humphries to the fourth and fifth declarations, and yet none of them are named in or made parties to the citaor made parties to the citation or writ of error.

12. The Mississippi State railroad assessors, composed of J. F. Sessions, Walter McLaurin and J. H. Askew, were each made parties to the first, second and third declarations, under said section 4200 of the Annotated Code, and said State railroad assessors composed of J. J. Evans, J. D. McGinnis and M. M. Evans were each so made parties to the fourth and fifth declarations, and yet none of them are named in or made parties to the citation or writ of error.

No Federal question is raised in this case.

14. No Federal question was raised at the proper time, nor in the appropriate way.

15. There are non-Federal questions decided, which are sufficient to sustain the judgment, without reference or regard to any alleged Federal question.

And the said defendant in error by counsel as aforesaid also moves the Court to affirm the said judgment from which said writ of error purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was obtained for delay only.

R. C. BECKETT,

Counsel for Defendant in Error for the Purposes of These Motions.

5599

In the Supreme Court of the United States.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

STATEMENT.

We will state generally that this is a consolidated suit embracing five separate suits, one for the taxes of 1892, one for those of 1893 and 1894 combined, one for those of 1895, one for those of 1896, and the last for the taxes of 1897, on what was formerly the property of the Louisville, New Orleans & Texas Railway Company, claimed in the declarations to be the property of the defendants, the present plaintiff in error. 2, 70, 99, 611, 622

The first three snits were consolidated and tried together under a consent order at the July, 1896, term of the Circuit Court of Hinds County, Mississippi.

Special Record, pp. 55-56.

There was a verdict and judgment in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893 and 1894.

Special Record, pp. 68-70.

Both sides appealed to the State Supreme Court, the plaintiff as appellant and the defendants as cross-appellants. The Mississippi Annotated Code of 1892 provides that "writs of error as heretofore used are abolished; and all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court as herein provided, and shall be dealt with by said Court without regard to the manner of removing the cases to such Court." Sec. 31.

Section 147 of the Constitution (Annotated Code of 1892, bottom page 65), provides that "no judgment or decree in any Chancery or Circuit Court rendered in a civil case shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction."

Section 3747 of the Annotated Code of 1892 makes all taxes lawfully levied "a debt due by the person or corporation owning the property or doing the business, * * * and may be recovered by action," and Section 3746 makes the taxes "entitled to preference over all judgments, executions, incumbrances or liens whensoever created" * * * and this is a re-enactment of Section 470 of the Code of 1880.

We make these citations to show that where no objection is made in the trial Court, it is immaterial under the Mississippi practice whether the suit should have been brought in the Court of law or equity proper.

On June 20th, 1898, the Supreme Court reversed the case both on the appeal and cross-appeal, on account of the compromise verdict of the jury in dividing the years on substantially the same evidence, and after settling the principles involved in the pleadings, it was remanded, and disposed of again in the Circuit Court at its June, 1898, term in favor of the plaintiff, and from a judgment in the Supreme Court on February 20th, 1899, on the second appeal, affirming the action of the Circuit Court this writ of error is prosecuted.

The present Yazoo & Mississippi Valley Railroad Company was formed from a number of railroad companies, as follows:

The Memphis & Vicksburg and Natchez & Jackson Railroad Companies were chartered by the Legislature of Mississippi in 1870, at first without any exemption from taxation, but at the same ses-

sion an exemption was given to the Mobile & Northwestern Railroad Company, by what is now generally known as the 21st section of the Mobile & Northwestern Railroad Company charter, and this 21st section was by a general bunching act extended to several other railroads by name, including said above named two railroad companies, but not to all the railroads chartered at that session.

There was an act passed on March 3d, 1882, authorizing the said Memphis & Vicksburg Railroad Company and a Mississippi Valley & Ship Island Railroad Company to consolidate and form one company, and the charters of the two companies were made a part of the charter of the consolidated company, and by the 5th section of the act the 21st section of said Mobile & Northwestern Railroad charter was made a part of the act.

The said Mississippi Valley & Ship Island Railroad Company did not go into the consolidation, and on March 15th, 1884, an amendatory act was passed authorizing any other railroad company to take the place of the Mississippi Valley & Ship Island Railroad Company, and under said act, on August 12th, 1884, the said Louisville, New Orleans & Texas Railway Company was formed by a consolidation of the said Memphis & Vicksburg Railroad Company with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, together with a Louisiana Company and a Tennessee Company.

This New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company was chartered on March 9th, 1882.

On February 19th, 1890, an act was passed allowing the Natchez, Jackson & Columbus Railroad Company to sell its railroad together with all rights, privileges, franchises and "immunities," and in March, 1890, it was sold under this act to said Louisville, New Orleans & Texas Railway Company.

The original Yazoo & Mississippi Valley Railroad Company was chartered on February 17th, 1882, and on October 24th, 1892, a consolidation or merger was consummated between the said Yazoo & Mississippi Valley Railroad Company and said Louisville, New Orleans & Texas Railway Company under the name of the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error.

In December, 1892, there was an injunction sued out by said

Natchez, Jackson & Columbus Railroad Company against the sheriff of Adams County alone, to prevent the collection of State and county taxes on that railroad in that county, and the Supreme Court at its spring term on May 8th, 1893, sustained this injunction and held that property was not liable for taxation for that year.

In December, 1893, the State revenue agent commenced bringing these suits for the taxes on the original property of the said Louisville, New Orleans & Texas Railway Company, shown in the declarations to be the main line, Riverside Division, and Helena, Bayou Sara and Tallahatchie Branches, but not including any part of this Natchez, Jackson & Columbus Railroad. The original name of Natchez & Jackson had been changed to Natchez, Jackson & Columbus Railroad Company as shown in what is known as the Lambert Case in 70 Miss., cited below.

M. & V.R. R. Co. Charter, Acts 1870, p. 316; p. 8 Special Record.

N. & J. R. R. Co. Charter, Acts 1870, p. 221.

Acts extending 21st Section, Acts 1870, p. 327; Special Record, pp. 8-10.

The 21st Section, Acts 1870, pp. 268-269; Special Record, pp. 9-10.

Acts Authorizing L., N. O. & T. Ry. Co., Acts 1882, p. 1011 and Acts 1884, p. 936; Special Record, pp. 10-13.

Consolidation deed August 12, 1884; Special Record, p. 1.

N. O. B. R. V & M. R. R. Co. Charter, Acts 1882, p. 920; Special Record, p. 10.

Y. & M. V. R. R. Co. Charter, Acts 1882; p. 838; Special Record, p. 12.

Consolidation deed Y. & M. V. R. R. Co., Special Record, pp. 3-6.

Act Authorizing Sale N. J. & C. R. R., Acts 1890, p. 675.

N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779.

Declarations, as to what property involved, Special Record, p. 14.

In these consolidated causes the Supreme Court of Mississippi decided five things:

1st. That the Legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.

2d. That it could not grant an irrepealable exemption under said Constitution.

3d. That a new company was formed by the consolidation of October 24th, 1892, and no exemption passed into it.

4th. That if the consolidation was a technical merger, still section 180 of the Constitution of 1890 prevented any exemption from passing into it.

5th. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890.

See Opinions of June 20th, and November 22d, 1898.

See also Special Record, pp. 124-127. 3 Mill Rep p. 513 & 63

No provision of the Federal Constitution was anywhere mentioned or relied on *till after this decision*, and since that time the defendants have in their suggestion of errors, petition to remove to the Federal Court, additional pleas, and in their assignment of errors on the second appeal assailed *this decision* as violative of section 10, Art. 1, and the 14th Amendment to the Constitution of the United States.

To save repetition the other material facts are omitted here, but will be narrated in the brief under the various grounds of the motion to dismiss, to which they are applicable.

The material parts of the Constitutions, laws and charters involved, including the exemption claim, known as the 21st section of the Mobile & Northwestern Railroad Company charter, are printed in the Special Record, pages 7-13, and the deed of consolidation of October 24th, 1892, is on pages 3-6.

While the consolidated case for the taxes of 1892, 1893 and 1894, and 1895 was pending in the Supreme Court, two other suits had been brought for the taxes of 1896 and 1897 respectively, and on the return of the case to the Circuit Court these two suits were also by a consent order consolidated with that, and they all proceeded under the Circuit Court, No. 2788, which was the number of the first suit. Special Record, pp. 117-118.

BRIEF ON MOTION.

FIRST GROUND.

This is substantially the same as the 14th ground, that no Federal question was raised at the proper time or in the appropriate way, ex-

cept that it suggests in detail why this is so. There are, among others, three reasons why this ground is well taken.

1st. No Federal question was at any time raised or attempted to be raised until after the decision in the Supreme Court, on June 20th 1898, and then for the first time in the suggestion of errors, which under the Supreme Court, rule 10 (see 70 Miss., p. XXIII.), is used in practice instead of a petition for rehearing. It is as follows: "The Court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper."

We have printed the whole record of the pleadings up to that point in order to show that there was no attempt whatever to raise a Federal question until then. That was too late.

Miller vs. Cornwall, 168 U. S. 133-135.

Pim vs St. Louis, 165 U. S., 273.

Sayward vs. Denny, 158 U. S., 180.

Morrison vs. Watson, 154 U. S., 111.

Miller vs. Texas, 153 U. S., 535.

Loeber vs. Schroeder, 149 U. S., 580.

Bushnell vs. Crooke, 148 U. S., 682.

Schuyler vs. Bolling, 150 U. S., 85.

Powell vs. Brunswick, 150 U. S., 433.

2nd. This is a writ of error from a second appeal to the State Supreme Court, and in Mississippi as in this Court, and we suppose generally in Courts of last resort, the rule is that what has been examined and decided or could have been examined and decided on the first appeal is *res adjudicata* and cannot be re-examined on a second appeal unless it is left open by the decision.

McKinney vs. State, 117 Ind., 27-28.

Bridgeforth vs. Gray, 39 Miss., 136.

Henderson vs. Winchester, 31 Miss., 290.

Stewart vs. Stebbins, 30 Miss., 66.

Smith vs. Elder, 14 S. & M. (Miss.), 100; 13 S. & M., 138 and 445.

Supervisors vs. Kennicut, 94 U. S., 498.

The Lady Pike, 96 U. S., 461.

Sizer vs. Many, 16 How., 98.

Great Western vs. Burnham, 162 U. S., 343-344.

The plaintiffs in error may attempt to rely on the last case just cited of Great Western, etc., vs. Burnham, which leaves it open as to whether this Court will notice a Federal question on a second appeal that was not raised on the first appeal.

162 U. S., 340-341, 343-346.

But the decision refers to another exactly in point in this case, where the writ of error was dismissed, N. Pac. R. R. Co. vs. Ellis, 144 U. S. 458. 162 U. S., 344-345.

And in a later case it is held that a Federal question cannot be raised for the first time after the principles of the case have been settled by the Supreme Court, and the case reversed and remanded.

Union, etc., vs. Kirchoff, 169 U. S., 103.

This would follow logically from the ruling that the question cannot be raised for the first time on a petition for rehearing, for if it was raised in the petition for rehearing and overruled, it would overturn the established principles of *res adjudicata* to hold that it could then be raised in the inferior Court, which has no authority to overrule the Supreme Court. As we understand the rule to be deduced from these cases in 144 U. S., 162 U. S., and 169 U. S., it is this: That in order for a party to lay the proper foundation to obtain a review of his case in this Court, he must claim the right at the proper time and in the appropriate way, and that then the State Court cannot deprive him of it, if he does not abandon it himself. While the writ of error only brings up the proceedings since the first appeal *for review*, it does bring up *the record of the whole case*, and this Court on opening that record will determine first, whether the party has claimed the right at the proper time and in the appropriate way before judgment in the first appeal, and second, whether he has accepted the decision of the Supreme Court and abandoned his claim either by active or silent acquiescence, or whether he has still insisted on and retained it. It is due the State Courts that they should know at all times that the Federal question is being reserved and that it is the paramount question, which must control all others. This Court does not countenance experimenting.

Rosenthal vs. Coates, 148 U. S., 147-148.

L. & N. R. R. Co. vs. Louisville, 166 U. S., 709.

3rd. After the cause was remitted to the Circuit Court the defendants attempted to file certain "additional pleas," setting up for the first time their so-called Federal questions. These pleas attacked *the decision of the Supreme Court* and presented no Federal question, as we will endeavor to show under the argument on the 5th, 6th, 7th and 8th grounds of the motion. As to being deprived of their property without due process of law, the record shows that they were noted for their much-speaking, being heard twice in the Circuit Court and *five times* in the Supreme Court.

For additional pleas, Special Record, p. 145.

We will only deal here with questions of practice.

As shown in the bill of exceptions no leave was ever asked to file these pleas, and this was one of the grounds of the motion to strike them out, except the 2nd pleas on which plaintiff took issue.

Special Record, p. 186.

The pleading and regular trial terms had long since passed, and the cause was called peremptorily for trial. It is an unfailing rule that if a party wishes to file pleas out of time he must present them with his application so that the Court may judge whether they are such pleadings as ought to be filed.

Hunt vs. Walker, 40 Miss., 590.

18 Am. & Eng. Enc. Law, p. 505 and n. 5.

If this is not done the pleadings will be stricken out on motion.

Pool vs. Hill, 44 Miss., 306.

It is true the defendants could either on the hearing of the motion or afterwards ask leave to file them, *but this was never done.*

Pfeifer vs. Chamberlain, 52 Miss., 90-91.

If the Court should refuse to strike out, it is equivalent to leave to file, but striking them out cannot be assigned for error, for that would destroy the rule and pleading terms and give a party a right to file any kind of pleas, *sine die*, and *nolens volens.*

And even if leave had been asked to file them, it was a matter of discretion with the trial Court, and pertains to the State practice and modes of proceedure and raises no Federal question.

Stevens vs. Nichols, 157 U. S., 370-371.

Mexican Nat. R. R. Co. vs. Pinckney, 149 U. S., 199-201.

Long Island vs. Brooklyn, 166 U. S., 688.

Iowa Central vs. Iowa, 160 U. S., 389.
Hagar vs. California, 154 U. S., 639.
Sheets vs. Selden, 7 Wall., 416.
Wright vs. Hollingsworth, 1 Pet., 165.
Chirac vs. Reineker, 11 Wheat., 280.
Walden vs. Craig, 9 Wheat., 576.
Belleville vs. Cox, 109 N. Ca., 265.
Agne vs. Seitsinger, 104 Iowa, 485-486.

Of course the trial terms of the first three cases had been long past, for they had been to the Supreme Court. In the last two cases the writs were served in December, 1896, and December, 1897, and were returnable to the January, 1897, and January, 1898, terms respectively, as shown by certified copies of the writs which are filed and copied in Special Record, pp. 26-31.

These writs are not in the Supreme Court record, for the reason that under the State practice such writs are not included unless by request of a party to the suit, under Supreme Court Rule 3 (70 Miss., p. XX.), which provides that "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript."

The Annotated Code of 1892 provides that "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the Court by rule or otherwise shall allow;" "at the appearance term."

Pool vs. Hill, 44 Miss., 306, section 722, Code of 1892.

And "The summons in actions in the Circuit Court shall be made returnable on the first day of the term, and shall be executed five days before the return day thereof;" ib.Sec. 3417.

And in regard to suits by the revenue agent, "Such suits may be tried at the return term and shall take precedence of other suits." ib. Sec. 4194.

The Courts were held as follows: "In the County of Hinds, first district, second Monday of January and July, twenty-four days." ib. Sec. 626.

This was amended by the act of February 5th, 1898 (Acts of 1898, p. 72), to read as follows: "In the County of Hinds, first district, second Monday of January, twenty-four days; and third Monday of June, eighteen days," with the usual provision making all antecedent matters disposable of at these terms. This was after the appearance and trial terms of these cases.

Section 156 of the present Constitution (Annotated Code of 1892, bottom p. 66) provides that "The Circuit Court shall have original jurisdiction in all matters civil and criminal in this State not vested by this Constitution in some other Court,"

Hence the presumption is that its orders and judgments are correct, including the order striking out these pleas, and especially as the defendants did not *in writing*, or otherwise request these writs to be included in the Supreme Court record, but we have had certified copies of the writs made to show *affirmatively* that the attempt to file the pleas was too late.

We do not wish to claim a right to a judgment by default in these last two cases, for we now admit that there was a verbal understanding that these two cases were to take the same course as the previous cases, and this agreement was carried out in the order of consolidation. Special Record, pp. 117-118

What we do claim is that the striking out of these "additional pleas," because attempted to be filed out of time, and without leave of the Court, was not only right, but was a matter of State practice and proceedure, which is not reviewable by this Court.

And besides, it is the proper practice to strike out pleas which attempt to set up points which have been settled adversely on appeal.

Agne vs. Seitsinger, 104 Iowa, 485-486.

And in the opinion of the State Supreme Court on the last appeal, rendered February 20th, 1899, they say "the futility of that sort of pleading needs no comment." Dill Rep. p. 685

Another ground of the motion to strike out was that these pleas were very voluminous, stuffed with long and immaterial recitals, and rendered the true issue indefinite and uncertain, and the statute expressly authorized the striking out of such pleas. In common law Courts the rules of pleading require the issue to be reduced to a certain and definite point, in order that juries, who are not sup-

posed to be learned in the law, may have some intelligent idea of what they are trying. No ordinary jury could form the least conception of the precise issue they were called on to try in these pleas, whether the question was when the State was admitted into the Union, or when the treaty of Dancing Rabbit Creek was made, or whether the Supreme Court should be reversed, or many other useless and immaterial issues. The Code provides that if any pleading is so prolix or so framed as to hinder, embarrass or delay a fair trial on the merits, or so that the precise issue is rendered indefinite and uncertain, it may be stricken out on motion and this is the case here, and presents no Federal question.

Annotated Code, 1892, Sec. 704.

SECOND GROUND OF MOTION.

Withdrawal of Pleas, and Permitting Judgment "Nil Dicit."

There are three sets of these withdrawn pleas:—

1st. A Separate plea of the I. C. R. R. Co. to the first declaration, denying the alleged purchase of the L., N. O. & T. R. R., and a separate plea of the Y. & M. V. R. R. Co., claiming the benefit of the 5th section of its charter being a re-enactment of said 21st section of the charter of the M. & N. W. R. R. Co., reciting the consolidation of October 24th, 1892, and alleging in detail that the railroad companies had delivered the affidavits required in said 21st section, and received the tax collectors' receipts, and had never been able to pay the 8 per cent. dividend on capital stock, and denying the alleged purchase of the L., N. O. & T. R. R. by the I. C. R. R. Co.

2nd. A joint plea by the Y. & M. V. R. R. Co. and I. C. R. R. Co., setting up the same things.

3rd. A separate plea each numbered 2 of the "additional pleas," setting up the same things. Special Record, pp. 32, 33, 35, 145.

To these pleas, except the first of the I. C. R. R. Co. which concluded to the country, the plaintiff filed six replications to which demurrers were overruled. They were substantially as follows:—

1st. A denial that the L., N. O. & T. R. R. was not purchased by the I. C. R. R. Co., as alleged.

2nd. A denial that the profits had not been sufficient to pay the 8 per cent. dividend.

3rd. A denial that the taxes had been applied to the construction debts.

9th. Alleges that the proper cost of the road was not more than $4,000,000, and that the L., N. O. & T. Ry. Co. had issued $13,805,000 of four per cent. bonds, $8,731,000 of five per cent. bonds, and $8,374,000 of six per cent. bonds, and divided the proceeds except what was required to construct the road among the officers and stockholders, and that it was impossible to trace the proper construction debt or to tell what rate of interest it bears, which is a waiver of any pretended exemption.

10th. Alleges that the L. N. O. & T. Ry. Co. issued 48,242 shares of stock and disposed of the same for little or no consideration to its incorporators and others to make them stockholders; that the charter did not authorize the issuance of paid-up stock without consideration, and that the profits were sufficient to pay the dividend of 8 per cent. upon the full amount paid or agreed to be paid for the stock.

11th. Alleges that the I. C. R. R. Co. had paid off by novation with its own bonds all the construction debts and liabilities of said L. N. O. & T. Ry. Co., and the profits were more than sufficient to pay the 8 per cent. dividend on the stock.

14th. Alleges that all the railroads and branches of said L. N. O. & T. Ry. Co., except the main line and Tallahatchie Branch were acquired by purchase and did not come under the exemptive protection in the L. N. O. & T. charter.

Special Record, pp. 39-46 for these replications.

After the Court had striken out the "additional pleas" the defendants withdrew all their pleas on file and left these replications standing.

Special Record, p. 187. for withdrawal.

The verbal excuse made by them, which does not appear in the record, was that it gave the plaintiff undue advantage. That he was willing to go to trial on the facts of the case, and if he could secure a verdict in his favor well and good, but if it was adverse to him, he would then move for a judgment on the plea *non obstante veredicto*.

But this was an advantage which he had fairly gained by the

decision of the Supreme Court. In their opinion of November 22nd, 1898, pages 31, 32 and 33, they say there is evidence going to show that the railroad was not built by the L. N. O. & T. Ry. Co., and also that there is proof in the record that it had been able to pay this 8 per cent. dividend ever since the year 1888.

This Court has decided that it cannot review questions of fact even where a Federal question is involved, and the decision of the questions of fact raised by the pleas and replications would not even have involved a Federal question, but simply whether the railroad company had complied with its charter in matters *in pais*.

Egan vs. Hart, 165 U. S. 188.

Are the defendants then in any position to confess and abandon these facts and boldly ask this Court to take jurisdiction of a case which they themselves confess that they cannot sustain on the facts?

Was it not their duty to have gone on and tried the case on the facts, and if they succeeded, then the Federal question, if there was one, would have been *necessarily involved*, and that is essential to give this Court jurisdiction. As it stands, a Federal question is not and cannot be *necessarily* involved, because the defendants stand before this Court in default or mute on the facts.

THIRD AND FOURTH GROUNDS.

Petition to remove to the Federal Court. Special Record, pp. 118-133.

This petition was filed after the case had gone to the Supreme Court and they had settled the principles of the case, and reversed and remanded it, and long after the appearance and regular trial terms of all the cases, and is so manifestly unwarrantable as to raise the presumption that the defendants did not expect it to be treated seriously, but were merely using it as a lever in a desperate attempt to lift themselves into this Court from the Supreme Court of the State. But in answer to such attempts this Court has said:

"Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the State Court, and upon an adverse decision, then transfer it to the Federal Court. Here Rosenthal has

gone through the State trial and appellate Courts, and his rights have been finally declared by the Supreme Court of the State; and though as yet no formal decree has been entered in the trial Court, it is none the less true that he has experimented with the State Courts and been beaten and now seeks a different forum."

Rosenthal vs. Coates, 148 U. S. 147, 148.

There are three reasons why the removal should not have been allowed, and several why this Court should not take jurisdiction.

1st. It was not asked for at the appearance terms. This is essential.

Fox vs. So. Ry. Co., 80 Fed. Rep. 945.

Fisk vs. Henarie, 142 U. S. 459.

K. C. R. R. Co. vs. Daughtry, 138 U. S. 303.

Martin vs. Balt. & O. R. R. Co., 151 U. S. 673.

2nd. Because the Federal question must appear from the plaintiff's own statement of his claim, and cannot be raised by the defendant in his petition for removal. Cases exactly in point are:

Penn vs. Union & P. Bank, 152 U. S. 454.

Chappell vs. Waterworth, 155 U. S. 102.

Postal Tel. Co. vs. Ala., 155 U. S. 487.

East Lake vs. Brown, 155 U. S. 488.

Mex. Nat. R. R. Co. vs. Davidson, 157 U. S. 201-208.

Oregon vs. Skottmore, 162 U. S. 490.

Oregon vs. Mullen, 162 U. S. 498.

Oregon vs. Conlin, 162 U. S. 498.

Walker vs. Collins, 167 U. S. 57.

Galveston vs. Texas, 170 U. S. 226. 303. 171. US. 685

Right here we wish to press on the attention of this Court this idea, viz.:

We think this Court in its conservatism does not give that importance to its decisions in these matters to which they are justly entitled. It is a co-ordinate department of the government and as such entitled to as much consideration as any other.

When they decide that a certain state of case will not support a removal that is certainly the law of that case, and it ought to be *the* law of every other case occupying that identical status until it is modified or reversed. Of course it will not be the law of any case

occupying a different status, and it ought not to be considered settled if the decision is by a divided Court. But we contend that when dissenting opinions have disappeared, and it has become the settled rule of the Court, it then has all the authority of absolute law, and a case brought here in defiance of that rule should not be affirmed, but dismissed for want of jurisdiction, because the Court having settled the law that it is not removable, that eliminates from it the *color* of a Federal question of which it before lacked only the *essence.* In the steady sunlight of the rule the shadow vanishes.

3rd. No Federal question is raised in the pettition for removal.

We will argue this point under the 5th, 6th, 7th and 8th grounds of the motion as they deal with the rulings of the Supreme Court which constitute the grievances complained of in the suggestion of errors, in this petition for removal, and the "additional pleas."

What we wish to call the attention of the Court to here is, that there must be color for a real and not a fictitious, or *factitious* Federal question. The pleader cannot *create* a Federal question by any system of pleading.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

Wilson vs. North Carolina, 169 U. S. 595.

St. Joseph vs. Steele, 167 U. S. 662.

Clark vs. McDade, 165 U. S. 172.

Hamblin vs. Western, 147 U. S. 532.

And that the striking out of, or refusing a manifestly defective petition for removal raises no Federal question.

Penna. Co. vs. Bender, 148 U. S. 255.

Wilson vs. N. Ca., 169 U. S. 595.

It was said by the Chief Justice in Millingar vs. Hartupee, 6 Wall. 258, that "If a right were claimed under a treaty or statute and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it could hardly be insisted that this Court could review the decision of a State Court that the right claimed did not exist."

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

In this case there is no statute *"in existence or in force"* which justified a petition for removal of this case after *"the appearance term."*

As said by this Court in the last case cited above, if it were "otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay." If six months, why not six years, or sixty years, or after final judgment? Where will the limit be fixed? And delay is plainly the purpose here. The petition is filed after the appearance term, raised no Federal question, and is not a removable case, if it did, under repeated decisions of this Court, and there could have been no reasonable expectation of its being granted.

Another idea occurs here. We think if there ever was any Federal question presented by the refusal of this petition, it was waived and lost by the judgment *nil dicit*.

We do not contend that if a petition for removal is refused, the petitioner cannot say nothing further, and let judgment go against him, nor that he cannot go on with his case, and in either event save the benefit of his application.

But in this case the defendants did neither, and we do contend that when they did not remain silent, but took further steps in the case, and then in writing made a voluntary withdrawal of their pleas on file, and abandoned the case, they abandoned it for all purposes not saved in the written withdrawal. They did not simply stand back and let judgment go on their pleas, but actively withdrew the pleas, which was an actual abandonment of the case, and they did not save and reserve any right to afterwards insist on their petition for removal. See the withdrawal.

Special Record, p. 187.

This is a peculiar case, and we wish to make our meaning plain. For instance, a party can plead the statute of limitations, payment, and the statute of frauds. Now if the Court should overrule or strike out his plea of payment, or any of the other pleas, we do not contend that he could not withdraw the remaining pleas, which, perhaps, he could not prove, and still reserve and test his right to insist on the overruled or stricken out plea, because that would be an independent and complete defense within and of itself to the suit.

But in this case the pleas withdrawn contain the basic principle of any and all other pleas whatever. Any plea relying on the laws of this State, or the United States, or any other law, which did not as a

condition precedent allege a compliance with these requirements of the charter would be fatally defective on demurrer.

Hence when the defendants withdrew the pleas containing these defenses, although they had been set up in separate pleas, they cut out the roots of their case and left the branches to wither.

FIFTH GROUND.

That the alleged exemption is unconstitutional because in terms *irrepealable.*

For the first opinion of Supreme Court, Special R. 124-127.

While the Supreme Court of Mississippi in one of its holdings did decide that under sections 13 and 20, Art 12 of the Constitution of 1869, exemptions could not be granted to corporations as a class, while individuals were taxed (see their full opinion, pp. 19-23), and while that was within the scope of the case, still it was not strictly necessary to a decision of this particular case, and hence is not reviewable here, and we omit any argument on it, although that part of the decision is the chief stock in trade of the defendants. Full Rec p 660-664

The alleged exemption in this case purports on its face to be irrepealable, "and which agreement is irrepealable."

For this 21st section see Special Record, pp. 9, 10.

The exemption in Miss. Mills vs. Cook was not to a single corporation, but to "all manufacturing companies" of a certain class, equally and uniformly, and while it is very similar in other respects to this 21st section now in controversy, it totally omits the words above quoted, "and which agreement is irrepealable."

56 Miss. 42.

That case did decide in the words of Judge Campbell on page 53, "The Constitution says it shall be subject to taxation the same as that of individuals; and the legislative act, whether it be a charter or other form of law, which says it shall be exempt and not subject to taxation, is in conflict with the Consttution;" * * * * and in the words of Chief Justice Simrall on page 62, "If the exemption is granted in the form of a contract in the charter, that is prohibited."

That decision was rendered at the April, 1878 term, and the charter of the L. N. O. & T. Ry. Co. now in controversy, was

authorized long afterwards on March 15th, 1884 (Acts of 1884, p. 936), by an act amending the act of March 3rd, 1882 (Acts 1882 p. 1011.)

Special Record, pp. 1 and 10-13.

It is not claimed by the plaintiffs in error anywhere that their alleged exemption was ever repealed, or attempted to be repealed by the legislature. But they claim that the *decision of the Supreme Court* violates Section 10 Article 1, and the 14th amendment of the Constitution of the United States. The Supreme Court held that this exemption being in terms irrepealable was manifestly unconstitutional even under the construction in said Miss. Mills Case.

See their opinion, pp. 19, 20. Rec. R. p. 514, 559-60.

This presents no Federal question. It has often been held by this Court that the decisions of the State Courts construing their own antecedent laws, or Constitution, or overruling their former opinions present no Federal question. That the Constitution of the United States only guards against a *subsequent law*, and not the decisions of the Courts. The distinction between both classes was made clear in the first case cited below.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Turner vs. Wilkes Co., No. 642 in this Court, decided March 20th, 1899.

Miller vs. Cornwall, 168 U. S. 134.

Adams Exp. Co. vs. Ohio, 165 U. S. 219.

Hansford vs. Davis, 163 U. S. 278, 279.

Winona vs. Minn., 159 U. S. 528, 529.

Hagar vs. California, 154 U. S. 639.

Wood vs. Brady, 150 U. S. 20-23.

Huntington vs. Athill, 146 U. S. 684.

Brown vs. Smart, 145 U. S. 454-458.

N. O. vs. N. O. W. W. Co., 142 U. S. 87, 8[illegible]

St. Paul vs. Todd, 142 U. S. 286, 287.

N. O. vs. La. Sug. Co., 125 U. S. 18-30.

Lehigh vs. Easton, 121 U. S. 388-392.

N. J. C. R. R. Co. vs. Mills, 113 U. S. 256, 257

Boyd vs. Ala., 94 U. S. 645.

R. R. Tax Cases, 92 U. S. 575

R. R. Co. vs. McClure, 10 Wall. 511-515.
R. R. Co. vs. Brock, 4 Wall., 177.

SIXTH GROUND.

That the alleged exemption was lost in and by the consolidation of October 24th, 1892.

Summary opinion, Special R. pp. 124-127.

The present Yazoo & Mississippi Valley Railroad Company (Y. & M. V. R. R. Co.) was formed on October 24th, 1892, by a consolidation of the original Yazoo & Mississippi Valley R. R. Co. with the Louisville, New Orleans & Texas Railway Company (L. N. O. & T. Ry. Co.) and said L. N. O. & T. Ry. Co., was formed on August 12th, 1884, by a consolidation between the Memphis & Vicksburg Railroad Company (M. & V. R. R. Co.) and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company (N. O. B. R. V. & M. R. R. Co.) for which charters and deeds of consolidation, see

Special Record, pp. 1-13.

There are two phases to this question, one of law and the other of fact.

1st. As there is no *subsequent law* after October 24th, 1892, which is claimed to effect this consolidation or exemption in any way, it is clear that the decision of the State Court that the effect of the statutes under which the consolidation was made was to create a new corporation and that the alleged exemption did not pass to the consolidated company is merely a construction by the State Court of its own local laws, and raises no Federal question under the authorities cited under the previous ground. See also in addition—

Long Island vs. Brooklyn, 166 U. S. 688.

Iowa Centr. vs. Iowa, 160 U. S. 389.

See the admirable argument of the Supreme Court on the effect of this consolidation in their opinion of November 22, 1898, p. 1-19. Jude Rec p. 638-659

In that opinion, pp. 16-19, the Court decide that the case of N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779, known as the Lambert Case, is not *res adjudicata* as contended by plaintiffs in error and besides overrule it. That presents no Federal question. The decis-

ions of the State Courts as to the effect of their own decisions raises no Federal question.

Phoenix Ins. Co. vs. Tenn., 161 U. S., 184-186.

California vs. Holliday, 159 U. S. 415-417.

Newport vs. Newport, 151 U. S. 527-538.

In re. Woods, 143 U. S. 202-206.

San Francisco vs. Itsell, 133 U. S. 65.

It could not be *res adjudicata* because it was not pleaded or offered in evidence.

See above opinion, pp. 16, 17. Trans Rec p. 656

21 Am. and Eng. Enc. Law, pp. 258, 259, and N. 1.

So. Pac. R. R. Co. vs. U. S., 168 U. S. 2, 55-60. U.S. vs Bliss 172 U.S. 326

And the rule is that a judgment concludes not only everything which was, but everything that might have been pleaded or offered in evidence, and this rule extends to and embraces a prior judgment, which if not pleaded or offered in evidence as *res adjudicata* or an estoppel, is itself overturned, concluded and annulled by the later judgment of June 20th, 1898.

1st. Van Fleet Former Adj., pp. 90, 91.

Freeman on Judgments, Section 332.

Even if the Lambert Case had been pleaded or offered in evidence, as it was a *different railroad,* and different charter, it would not only have not been *res adjudicata,* but not even *controlling authority,* as *stare decisis* or otherwise.

Wilmington vs. Alsbrook, 146 U. S. 279-302.

But as shown above neither the doctrine of *res adjudicata* nor *stare decisis* raises any Federal question in this Court.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Phœnix Ins. Co. vs. Tenn., 161 U. S. 184-186.

See also Wood vs. Brady, 150 U. S. 20-23.

2nd. The Supreme Court also found as a fact that what was actually done, as shown by the evidence, was the creation of a new corporation.

See their opinion of November 22nd, 1898, pages 5-8. Trans Rec. p. 513. 643-647

That was the finding of a fact within the competence of the Court, and its findings of fact raises no Federal question and is not subject to review.

Egan vs. Hart, 165 U. S. 188.
Israel vs. Arthur, 152 U. S. 361, 362.
Dower vs. Richards, 151 U. S. 663-672.
Backus vs. Font Street, 169 U. S. 563.

SEVENTH GROUND.

That Section 180 of the Constitution of November 1st, 1890, prevented any exemption from passing into the consolidation of October 24th, 1892.

Summary opinion, Special R. 124-127.

It will be noticed that this consolidation occurred nearly two years *after* the adoption of this Constitution.

Under this head the Supreme Court decide--

First—That a new corporation was formed and said Section 180 prevented an exemption from passing into it on the authority, among many other cases cited, of L. & N. R. R. Co. vs. Palmes, 109 U. S. 248.

St. Louis vs. Berry, 113 U. S. 475.
Schurz vs. Cook, 148 U. S. 408.
Keokuk vs. Mo., 152 U. S. 303, 310-312.
See their opinion, pp. 1-23. Full R. pp. 638—655

Second--That even if the effect of the consolidation in this case were a technical merger, and not consolidation, that still said Section 180 would prevent the exemption from passing, for the reason that the Constitution was adopted *before* the consolidation, and the authority to consolidate is not a vested right, but a mere license, which may be withdrawn or modified at any time before it is availed of on the authority of

Pearsall vs. G. N. R. R. Co., 161 U. S. 667.
L. & N. R. R. Co. vs. Ky., 161 U. S. 695.
Keokuk vs. Mo., 152 U. S. 312.
6 Am. and Eng. Enc. Law (2nd Ed.), p. 802.
See their opinion, pp. 1 and 9-15. Full R. pp 513. 638. 648—655
See also Galveston vs. Texas, 170 U. S. 226-240.
Bank vs. Tenn., 163 U. S. 424, 425.

So that under neither of the foregoing views is any Federal question involved.

The first proceeds on general principles of the construction of exemption laws, under repeated decisions of this and all other Courts, that an exemption from taxation is not to be implied, and that before it will pass into a consolidation the legislative intent to that effect must be clearly shown, quoting the opinion of Mr. Justice Peckham, in Phœnix Ins. Co. vs. Tennessee, 161 U. S. p. 178, that "Mere silence is the same as a denial of the exemption."

See their opinion, p. 11. True Rep. 650

And the second view proceeds on the ground that as an authority to consolidate is a mere license, that it will be subject to the laws in force at the time it is made, and neither of these views raise any Federal question. Under the last view the only question is, does the effect of said Section 180 prevent the exemption from passing, and this is a construction of the State Constitution by the Supreme Court of the State, and involves no Federal question in that the authority to consolidate is not a right, which before its exercise can be impaired, but a mere amendable or revocable license.

It is certainly a novel excuse set up in the petition to remove and in the additional pleas, that the defendants did not expect the Court to decide as it did, and that hence they are deprived of their property without due process of law, and that this is the first opportunity they have had to plead it. To plead what? Their surprise!

It is a very painful feeling to suddenly lose confidence in the judgment or sanity of the judges, but it is a very common thing for the Courts to decide cases, and for the lawyers and litigants on one side or the other "not to expect the Court to decide as it did," in fact we might almost venture to say it is inevitable, at least quite common, and arises naturally from the practical application of the quaint principle that it is very unwise for a Supreme Court to decide on both sides of the same question at the same time, though they sometimes do at different times.

But the pleadings show that the defendants had full notice that these points were being made and pressed, from the inception of the litigation. One of the grounds of the demurrer to their plea, which recited in detail a full compliance with the requirements of this 21st section, was that "said plea is no defense."

The 5th and 6th replications to this plea claimed that the exemp-

tion was lost in the consolidation and cut off by the Constitution of 1890.

The charges asked by plaintiff to the jury were among others a peremptory instruction, and specific charges on the effect of the consolidation; among the errors assigned in the motion for a new trial was the overruling of these contentions, and so among plaintiffs assignments of errors in the Supreme Court; and the points were all made in the brief of plaintiff in the Supreme Court, so that these points were openly and continuously pressed, and it is idle for defendants now to claim any surprise, or that they never had any opportunity to plead Section 10, Article 1, or the 14th Amendment of the Constitution of the United States. They must plead it at the *proper time* and in the *appropriate way*. Without intending to dictate, suppose they, after setting up the exemption and reciting a full compliance with the 21st section as they did, and the consolidation as they did, had just before the formal close of the plea, added something like this; "and having fully complied with the requirements of its charter in that behalf, the said defendants insist that it is a contract protected by Section 10, Article 1, of the Constitution of the United States, and that to deprive them of it now would not only violate that provision, but also the 14th Amendment to the said Constitution, because it would deprive them of their property without due process of law," would not that have been *at the proper time and in the appropriate way?*

For these demurrers, replications, charges, and assignment of errors, etc., see

Special Record, pp. 35-55, 61-64, 71, 97, and our original brief, on file, pp. 16, 17, 25-41.

EIGHTH GROUND.

That the alleged exemption was repealed by the Acts of 1884, 1886 and 1890. Nothing is said about this by the Supreme Court in the summary of their holdings delivered on June 20th, 1898, but it closes by saying "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed."

See first opinion, pp. 124-127. Sunn R. Jo. 515.

They did not file this full opinion till November 22nd, 1898.

In the meantime, in July, 1898, the case had been again tried in the Circuit Court on this "summary," or rather the proceedings, were under it, for there was no trial.

A motion was made to strike this full opinion from the files because it contained this *new ground*.

The proper motion would have been to strike the new ground *out of the opinion*, and not to strike out the whole opinion. This motion was overruled. See opinion overruling the same. Trans Rec p. 678

But the Court in its opinion of February 20th, 1899, in the last appeal, say that as it was put in after the trial, it could not possibly have had any influence *on the trial*, and was therefore *absque injuria*, as the judgment was sustainable on the other grounds without this one.

See their last opinion. Trans Rec p. 687

Hence under the settled rule of this Court, that if the judgment can be sustained on any of the other grounds, this would not confer jurisdiction, even if it were "without due process of law."

But the defendants did have the chance to make this point *on the second appeal*, and as shown by the last opinion of the Court *they did make it*, devoted almost their entire argument to it, and the Court did then re-affirm it, after they had had an opportunity to be heard, and were heard, and they said nothing about the United States Constitution. Trans Rec p. 685-687

This settles the question that the legislature had a right to repeal it.

But this raises no Federal question, for the reason that the charter was granted by the Amendatory Act of March 15th, 1884, after the decision in the Mississippi Mills Case, 56 Miss., p. 40, in 1878, holding that all exemptions were *repealable*. The defendants are estopped to set up any contention about its being "an irrevocable appropriation of taxes," because they accept the charter under the construction in said Miss. Mills Case holding a substantially identical "appropriation of taxes" to be an exemption and *repealable*.

56 Miss. p. 42.

Before the Federal Constitution can be invoked it must *in limine* be shown that there is such a contract as is subject to impairment.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

St. Joseph vs. Steele, 167 U. S. 662.

And it can raise no color of a Federal question for the legislature to repeal a *repealable exemption*, and much less for a State Court to construe its own laws where no Federal question could be involved in a construction either *pro* or *con*.

This is not in conflict with the case of Yazoo & Miss. Valley R. R. Co. vs. Thomas, 132 U. S. 174. In that case, p. 182, it was claimed that the exemption of the original Y. & M. V. R. R. Co., not this one, was a contract "irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, etc., is equivalent to a direct repeal of the charter exemption."

This Court, no doubt having in mind their own decisions at that time of Louisville vs. Palmes, 109 U. S. 248, and St. Louis vs. Berry, 113 U. S. 475, holding exemptions under similar constitutions void and illegal, significantly started off their opinion, p. 184, with the remark, "That the Supreme Court of Mississippi did not put its decisions upon the ground that it was not competent under the State Constitution for the State to contract with the company, that the latter should not be subjected to taxation."

If it had there would clearly have been no Federal question, but only the construction of an antecedent Constitution.

And on page 188 they say "it is agreed that the property could not be taxed until the period of exemption, whatever that is, shall have expired."

The question there was whether the exemption commenced from the date of the charter as contended on one side, or only from the time when the railroad was completed to the Mississippi river, as contended on the other, and when "it was agreed" that the exemption was a valid contract, it clearly raised a Federal question, for if the State should undertake to tax it on the theory that it was not exempt till completed to the Mississippi River, when under a legal and proper construction of the contract it was exempt from the date of the charter, such action would violate the obligation of the contract, and hence this Court was forced to decide whether the admitted exemption should commence at the one time or the other.

But in the case at bar, the State Supreme Court have decided the identical question left undecided in the above case that an irrepealable exemption was unconstitutional and void, and they show further that at the time this charter was granted on March 15th, 1884, it had been determined in the Miss. Mills Case, in 56 Miss. 40 that all exemptions were repealable, and hence a repeal could not impair the contract of exemption if any existed.

NINTH GROUND.

Under this ground we will notice two questions of practice.

1st. The jurisdiction of the Circuit Court commencing its term on June 20th, 1898, to try a case reversed and remanded to it from the Supreme Court on that day, the mandate being filed July 4th, 1898, and the case being reached and called for trial on July 4th, 1898.

2nd. The refusal to continue the case on account of the absence of alleged leading counsel.

The persistence with which the defendants have raised a multitude of Banquo's ghosts in this case, *since the Supreme Court's decision,* and named them Sections 10, Article 1, and the 14th Amendments, is utterly amazing and bewildering.

As to the point that the Circuit Court had no right to try at the June term, 1898, the affidavit of F. A. Critz shows that the defendants had due notice that the case would be called at the time it was called, and that there was an agreement, that if the case should be tried the testimony already in the record should be used to save the expense.

Special Record, pp. 142, 143.

And the record and proceedings show that the defendants' counsel were promptly on hand, but not chafing for the fray. The Circuit Court decided that it did have jurisdiction to proceed, and this was affirmed by the Supreme Court in the opinion of February 20th, 1899, and is conclusive on this Court, and not subject to review. This Court has no authority or inclination to prescribe the times and places of holding the State Courts. True Rec p. 685-686

They say "the plaintiff did appear before the board, and was

heard by its counsel and through its officers, and the construction placed by the Supreme Court of the State on the act—a construction which is conclusive in this Court—is that the railroad companies are given the right to be present and to be heard."

Pittsburgh vs. Backus, 154 U. S. 426.

And as to the point that the failure to continue on account of the absence of leading counsel, etc., deprived the defendants of their property, without due process of law, the said affidavit of F. A. Critz, and the record also showed that Mr. Mayes, who was then present in Court, conducting the proceedings, had always prepared and filed all the pleadings and proceedings, and had personally been in the control and conduct of the case. Besides this affidavit, the record shows that the litigation has been close and prolonged, and that as a matter of fact it was argued three times before the Supreme Court, being twice remanded to the docket for that purpose, and that in allof these matters Mr. Mayes appeared for the defendants. It was also shown in said affidavit that there was an agreement, if the case was tried, to use the evidence already on hand.

Special Record, pp. 100, 101, 142, 143.

It is clear that if the absent counsel had been present they could not have legally induced the Circuit Court to overrule the Supreme Court, and it had been previously decided, both in this Court and in the State Court, that the absence of "favorite counsel" is no cause for continuance, under such circumstances.

Garnett vs. Kirkman, 41 Miss. 97-99.

Means vs. Bank of Randall, 146 U. S. 629.

We feel that it is a useless consumption of the time of this Court to dwell long enough to establish a residence on these questions.

These matters of practice in the State Courts raise no Federal question.

Hagar vs. California, 154 U. S. 639.

Lambert vs. Barrett, 159 U. S. 662, 663.

Iowa Cent. vs. Iowa, 160 U. S. 389.

Long Island vs. Brooklyn, 166 U. S. 685-688.

Besides bills of exception were taken in the Circuit Court to its action in all of these matters, and it was never intimated to that Court that its course would violate any provision of the Constitution of the United States.

All the questions raised related entirely to the State practice, and a Federal question cannot now be injected into it for the first time in the assignment of errors.

Special Record, pp. 115, 136, 143.

TENTH GROUND.

The State counties and towns not made parties.

Special R. p. 24.

It is true the statute, Annotated Code, of 1892, Section 4194, requires the Revenue Agent to sue in his own name, but "for the use of the State, counties and towns interested," and it also provides that "he shall not be liable for costs, and may appeal without bond," and we submit to this Court whether under this provision they can make the Revenue Agent liable for costs, or whether they will not have to have the real usees before them, so as to tax them with the costs, in case the judgment should be for the defendants in error. In other words whether, as the State has provided, that the Revenue Agent shall not be liable for costs, whether this Court can violate that statute, or whether their proper course would not be to render judgment for costs against the real litigants.

If the proper parties are not made, either under this or the next two succeeding heads, the proper course is to dismiss.

Wilson vs. Kiesel, 164 U. S. 251, 252.

ELEVENTH AND TWELFTH GROUNDS.

That the Railroad Assessors and tax collectors are not made parties, as required by section 4200 of said Annotated Code of 1892.

Have they not an interest in showing that they have not been in "wilful default," if this Court should take jurisdiction? And in sustaining this judgment? This section 4200 is as follows:

"In all suits against delinquent taxpayers, the assessor and tax collector shall be made parties; and if it shall appear that the failure of the tax payer to properly pay his taxes, was caused by any wilful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of the compensation of the Revenue Agent."

Special R. pp. 25, 26.

THIRTEENTH, FOURTEENTH AND FIFTEENTH GROUNDS.

These are merely general grounds, and intended to cover any point that may suggest itself to the Court, which we have not touched on. In questions of jurisdiction this Court will notice *sua sponte* any vital point shown in the record.

If either the 10th, 11th or 12th ground is good, the case will be dismissed.

If the 3rd and 4th grounds relating to the petition for removal are good, then if either the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, or 8th ground is good a dismissal will follow, on the ground that if the decision of the State Court is based on any ground not involving a Federal question, the case will be dismissed, although there are other grounds which do raise such a question, or questions.

Hence we ask a dismissal for want of jurisdiction.

MOTION TO AFFIRM.

If this Court should be of opinion that the petition for removal, or any other claim set up in this cause, does raise a sufficient color of a Federal question to prevent an absolute dismissal, then we ask the Court to affirm, with damages for delay, under the authorities in this Court, that a motion to dismiss or affirm, when it appears that there is color for the motion to dismiss, and the contention of plaintiffs in error has often been determined adversely, the motion to affirm should be granted.

Sire vs. Ellithorpe, 137 U. S. 579.
The S. C. Tryon, 105 U. S. 267.
Hinkley vs. Morton, 103 U. S. 764.
St. Louis vs. Montana, 171 U. S. 650.

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